Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

ROBERT E. HENRY,

Petitioner,

v.

BILL LOCKYER,
California State Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a petition for writ of habeas corpus that is filed after the petitioner has served his full sentence relates back under Federal Rules of Civil Procedure, Rule 15(c) to the date of an earlier identical petition that was filed while petitioner was in prison but was dismissed without prejudice for failure to exhaust state remedies, so as to satisfy the custody requirement of 28 U.S.C. § 2241(c)(3).

2. Whether the restraints imposed upon a convicted sex offender by California's version of Megan's Law (California Penal Code § 290) constitute custody within the meaning of 28 U.S.C. § 2241(c)(3).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed January 15, 1999.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 164 F.3d 1240 (9th Cir. 1999) and is attached as Appendix A.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on January 15, 1999. A petition for rehearing and rehearing en banc was timely filed and was denied on April 1, 1999 (Appendix F). This petition for Writ of Certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13(1) and (4). This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 2254 provides in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> An amendment relates back to the date of the original pleading when . . .
>
> . . . .
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

28 U.S.C. § 2244(b) severely limits the conditions in which a "second or successive" habeas petition may be filed under Section 2254.

California Penal Code, Section 290, requires every person convicted of a sex offense to register with the chief of police (or the sheriff's office in county territory) of the city (or county) in which he resides. Registration must be done within five days of taking up residence in the city (or county). Each such person must re-register each year within five days of his birth date for the rest of his life. Section 290(a)(1)(A) and (C). Information about the person's conviction and present whereabouts may be disseminated to educational institutions and "community members at risk" and shall be made available to the public by means of a "900" telephone number. Section 290(m) and 209.4.

STATEMENT OF THE CASE

The facts of the case are set forth in the 1999 Opinion of the Ninth Circuit (Appendix A) and its earlier opinion in this same matter (Appendix B). Petitioner was convicted in California State Superior Court of a sex offense within the meaning of California Penal Code, Section 290. The conviction was affirmed by the California Court of Appeal, and the California Supreme Court denied a petition for hearing. In 1990, while serving his prison sentence, petitioner filed his original habeas petition in District Court. The court granted the petition and the Ninth Circuit affirmed, but the Supreme Court reversed, holding that Petitioner had not exhausted his claims in state court. *Duncan v. Henry*, 513 U.S. 366 (1995). (Appendix C). On remand, the District Court dismissed the petition without prejudice. (Appendix D). In an effort to satisfy the exhaustion requirement petitioner refiled in state court. That petition was denied, and he filed the present petition on March 17, 1997 after his release from prison and after his discharge from parole. The District Court granted the petition (Appendix E), but the Ninth Circuit reversed, holding that Petitioner did not meet the custody requirement of 28 U.S.C. § 2241(c)(3). (Appendix A). In doing so, the Court rejected two contentions made by petitioner. First, petitioner contended that the refiled petition should relate back to the date of the original petition pursuant to Federal Rules of Civil Procedure, Rule 15(c). The Ninth Circuit acknowledged that this contention presented a "novel" question (164 F.3d at 1241) but rejected it, stating that the district court's dismissal without prejudice of the original petition "terminated the litigation," citing *Farmer v. McDaniel*, 98 F.3d

1548, 1552 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997). The court further reasoned that to grant the petition would defeat the very purpose of habeas relief, which the court said is "to effect release from illegal custody."

Petitioner's second contention was that the restraints imposed by California Penal Code, Section 290 upon convicted sex offenders met the custody requirement.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this case meets the standard of Supreme Court Rule 10(c). The Ninth Circuit decided what it characterized as a "novel" question. There are no Supreme Court decisions on the issue, and it should be settled by this Court. For the reasons hereafter stated, the Ninth Circuit's decision was erroneous and should not be allowed to stand as the sole Court of Appeals decision on this important question.

ARGUMENT

I.

The Relation Back Doctrine Of Federal Rules Of Civil Procedure, Rule 15(c) Should Apply When An Original Petition Is Dismissed Without Prejudice For Failure To Exhaust State Remedies, And A Subsequent Petition Is Filed After State Remedies Have Been Exhausted And Is Based On The Exact Same Facts As Were Asserted In The Original Petition.

The Ninth Circuit set forth two reasons in support of its ruling on this issue. First, the Court relied on *Farmer v.*

McDaniel, 98 F.3d 1548, 1552 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997), quoting language to the effect that a dismissal without prejudice "effectively terminated the litigation." It is submitted that whether or not the dismissal in this case "terminated" the litigation does not answer the question whether the refiled petition should relate back in point of time to the original one. Furthermore, two things distinguish *Farmer*. First, the issue in that case was whether the dismissal was a final judgment for purposes of appeal under 28 U.S.C. § 1291; second, the order in question dismissed the *action*. The court noted that a different result follows where, as here, the order in question simply dismisses the *complaint*. *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743 (9th Cir. 1993), cited and relied upon in *Farmer*, makes the same distinction, stating at page 747:

> This is not a case where the district court dismissed a complaint to allow exhaustion or amendment of the complaint.

There is every reason why the petition should relate back. It is the exact petition that was filed in 1990 while petitioner was in prison. Only two cases, both district court cases, have been found that specifically address this question. They are *Williams v. Vaughn*, 3 F.Supp.2d 567 (E. Dist. Pa. 1998), and *Hammock v. Vaughan*, 1998 U.S. Dist. LEXIS 4562 (E.D. Pa. 1998). Both cases are directly on point, holding that the refiled petition relates back.

There is, however, a line of decisions by various courts of appeals that are analogous to this case. They consistently hold that where a habeas petition is dismissed without prejudice for failure to exhaust state remedies, a petition that is refiled after state remedies

have been exhausted is not a "second or successive" petition so as to constitute an abuse of the writ or run afoul of the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(b). Rather, the refiled petition is deemed a mere "continuation" of the proceedings initiated by the filing of the original petition. *In re Turner,* 101 F.3d 1323 (9th Cir. 1996); *In re Gasery,* 116 F.3d 1051 (5th Cir. 1997); *Carlson v. Pitcher,* 137 F.3d 416 (6th Cir. 1998); *Carter v. U.S.,* 150 F.3d 202, 204 (3d Cir. 1998); *In re Goddard,* 170 F.3d 435 (4th Cir. 1999). Thus, *In re Gasery, supra,* states at page 1052:

> We agree and conclude that Gasery's refiled petition is merely a continuation of his first collateral attack, not a 'second or successive' petition within the meaning of § 2244(b). *See Benton,* 106 F.3d at 164 ('The sequence of filing, dismissal, exhaustion in state court, and refiling. . . . might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks.').

The second reason upon which the Court of Appeals based its decision was that "to hold that Henry's petition relates back to his original petition would defeat the very purpose of habeas relief: 'to effect release from illegal custody.' *Preiser v. Rodriguez,* 411 U.S. 475, 486 n.7 (1973)."

The cases reject this analysis. If a habeas petitioner was in prison or otherwise detained at the time he filed his original petition, the case is not rendered moot by his subsequent release, if there are "collateral legal consequences that may flow from the challenged conviction." In such case, the relief that may be granted on a habeas petition is not limited to release from custody; the court

can provide whatever remedy law and justice may require to deal with the collateral consequences. *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Robbins v. Christianson*, 904 F.2d 492 (9th Cir. 1990). The requirements of California Megan's Law discussed in the next section clearly constitutes "collateral legal consequence," whether or not they constitute custody.

II.

The Restraints Imposed Upon A Person Convicted Of A Sex Offense By California's Version Of Megan's Law (California Penal Code, Section 290) Constitute Custody Within The Meaning Of 28 U.S.C. § 2241(c)(3).

The leading case on this issue is *Jones v. Cunningham*, 371 U.S. 236 (1963). It holds that the writ may be granted whenever conditions or restrictions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." 371 U.S. at 243. The court there goes on to state as follows:

> Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

The restraints imposed by Megan's Law are very real. The requirement to re-register upon moving one's residence impairs one's freedom to move about as ordinary people can do. The provisions authorizing dissemination

of information about the registrant will force such a person to attempt to live in areas where such dissemination is not likely to occur, and these are not likely to be the more desirable neighborhoods. Furthermore, in order to register or re-register petitioner is required to appear personally at the police station, where he is taken into the part of the building that is behind the locked doors. There he is fingerprinted and required to pose for a "mug shot." (Excerpts of Record before the Ninth Circuit, pages 42-43. The Attorney General has never disputed Petitioner's assertion in this regard.) All of these factors taken together place a person such as Petitioner under a lifetime cloud, unable to live as free men do.

CONCLUSION

For the foregoing reasons, petitioner Henry requests that a Writ of Certiorari issue in this case.

Dated: June 29, 1999

Respectfully submitted,

EVERETT B. CLARY
Attorney for Petitioner

APPENDIX A

Robert E. HENRY, Petitioner-Appellee,

v.

Daniel LUNGREN, California State Attorney General, Respondent-Appellant,

Wayne Estelle, Respondent.

No. 97-56215.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1998.

Decided Jan. 15, 1999.

David F. Glassman, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.

Robert E. Henry, Pro Per, Oxnard, California, and Everett B. Clary, O'Melveny & Myers, Los Angeles, California, for the petitioner-appellee.

Appeal from the United States District Court for the Central District of California; Robert M. Takasugi, District Judge, Presiding. D.C. No. CV-96-08509-RMT.

Before: FLETCHER, THOMPSON, and McKEOWN, Circuit Judges.

McKEOWN, Circuit Judge:

The Attorney General of the State of California appeals from the district court's grant of Robert E. Henry's petition for habeas corpus. Under 28 U.S.C. § 2241(c)(3), the district court had jurisdiction to entertain Henry's petition for a writ of habeas corpus only if he

was "in custody" when the petition was filed. Because Henry was not "in custody" at the time he filed the present petition, the district court lacked jurisdiction and therefore we reverse.

This case has a long history that is best summarized in the previous opinions. *Henry v. Estelle*, 33 F.3d 1037 (9th Cir.1994) (per curiam), rev'd sub nom. *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam).

Henry, a convicted sex offender, filed his first habeas petition in federal court in 1990. After the Supreme Court held that he had not properly exhausted his claims in state court, 513 U.S. at 366, 115 S.Ct. 887, upon remand in 1995, the district court dismissed the petition without prejudice. In an effort to satisfy the exhaustion requirement, Henry refiled in state court; his petition was denied. Henry then filed the present petition on March 17, 1997, after his release from prison and after his discharge from parole. Henry argues that he was in actual, physical custody when he filed the petition, claiming that the date he filed the earlier habeas petition – not the date of the present petition – determines whether he satisfied the "in custody" determination. We disagree. The district court's dismissal of Henry's original petition for failure to exhaust state remedies "terminated the litigation." *Farmer v. McDaniel*, 98 F.3d 1548, 1552 (9th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1474, 137 L.Ed.2d 686 (1997). The relevant date is the date on which Henry filed the present, second petition.

This case presents the novel question of whether the filing of the second habeas petition, following dismissal

without prejudice of the first petition, relates back to the date of the first petition. The Federal Rules of Civil Procedure apply to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States." Fed.R.Civ.P. 81(a)(2). Rule 15(c)(2) provides for the relation back of an amended pleading to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c)(2). Henry's filing of the second petition does not, however, relate back under Rule 15(c)(2) to the filing date of the original habeas petition. The district court did not expressly or impliedly retain jurisdiction over Henry's original petition when the court dismissed for failure to exhaust. Because Henry's original habeas action was dismissed in 1995, there was no pending petition to which Henry's new 1997 petition could relate back or amend. *See Lefkowitz v. Fair*, 816 F.2d 17, 22-23 (1st Cir.1987) (holding district court did not retain jurisdiction over habeas petition after dismissing petition without prejudice for failure to exhaust state remedies and not expressly or impliedly retaining jurisdiction); *but see Williams v. Vaughn*, 3 F.Supp.2d 567, 578 (E.D.Pa.1998) (holding that filing of second amended petition relates back under Fed.R.Civ.P. 15(c) to original filing date of first habeas petition, which was dismissed without prejudice to refile after exhausting state remedies).

To hold that Henry's present petition relates back to his original petition would defeat the very purpose of habeas relief: "to effect release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 486 n. 7, 93 S.Ct. 1827, 36

L.Ed.2d 439 (1973). Although a petitioner's release from custody does not moot a pending habeas petition, *Carafas v. LaVallee*, 391 U.S. 234, 237-38, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), Henry was released *before* he filed the petition that is before us. Because of this circumstance, there is no custody from which he could be released. And, because his original petition was dismissed, Henry's circumstances are unlike those presented in *Miller v. Laird*, 464 F.2d 533 (9th Cir.1972), in which we held that an amended habeas petition related back to the date of the original petition and the district court retained jurisdiction where "the original petition had not been dismissed and the action was still pending." *Id.* at 534.

Henry also argues that he is still "in custody" because, as a convicted sex offender, he is now required under California law to register annually with law enforcement authorities. Henry claims that the lifetime registration requirement is tantamount to perpetual "custody." The Attorney General counters that registration under a so-called "Megan's law" is not "custody" for purposes of federal habeas relief. On the day of oral argument in this case, another panel of this Court filed its opinion on this very issue, holding that such a petitioner is not "in custody" and is precluded from federal habeas relief. *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir.1998). The reasoning of *Williamson* is controlling.

The only material difference between *Williamson* and this case is that the Washington sex offender law applies to Williamson, whereas California law applies to Henry. *Compare* Wash. Rev.Code § 9A.44.130 *with* Cal.Penal Code § 290. The laws are very similar in their essentials, each requiring a convicted sex offender to provide address and

other background information, fingerprints, and a photograph to the local law enforcement authority. California law is more restrictive in requiring annual registration; Washington requires a one-time registration upon release from custody, coupled with an annual address verification procedure. Both states require an individual to reregister upon change of address. Henry claims the California law requires in-person registration, although that is not spelled out in the statute.

The minimal differences between the two statutes do not justify a different result for Henry. Registration, even if it must be done in person at the police station, does not constitute the type of severe, immediate restraint on physical liberty necessary to render a petitioner "in custody" for the purposes of federal habeas corpus relief. *See generally Jones v. Cunningham*, 371 U.S. 236, 242-43, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Instead, the registration requirement is merely a collateral consequence of conviction that is "not [itself] sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam).

Because the district court lacked jurisdiction over the petition for habeas corpus, we reverse and we need not address the other issues raised on appeal.

REVERSED.

APPENDIX B

Robert E. HENRY, Petitioner-Appellee,

v.

Wayne ESTELLE, Warden,
Respondent-Appellant.

No. 91-55691.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 9, 1991.

Decided May 18, 1993.

As Amended on Denial of Rehearing and
Rehearing En Banc Aug. 19, 1994.

As Amended Sept. 30, 1994.

Everett B. Clary, O'Melveny & Myers, Los Angeles, CA, for petitioner-appellee.

David F. Glassman, Deputy Atty. Gen., Los Angeles, CA, for respondent-appellant.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, D.W. NELSON, and BRUNETTI, Circuit Judges.

Per Curiam; Dissent by Judge BRUNETTI.

ORDER AMENDING OPINION and DENYING PETITION FOR REHEARING and REHEARING EN BANC

The opinion filed at 993 F.2d 1423 is amended as follows:

> [Editor's Note: Amendments incorporated for purposes of publication].

Except for the above amendments, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The petition for rehearing en banc was circulated to the full court. An active judge of this court requested a vote as to

> whether the case should be reheard en banc. Less than the required majority of the non-recused active judges voted to take the case en banc.

No further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue forthwith.

Judge Brunetti dissents from this order and files herewith a dissent to the amended opinion.

OPINION

PER CURIAM:

This is an appeal from a grant of habeas corpus by the United States District Court for the Central District of California. Petitioner Robert Henry contends that he was denied due process at his trial for child molestation because evidence of an uncharged crime was erroneously

admitted and then followed by a jury instruction emphasizing that same evidence. The district court found that Henry had exhausted his state remedies and that the testimony in question was so inflammatory as to infect the entire trial and preclude fundamental fairness. We affirm.

Facts and Proceedings Below

Henry was tried for seven counts of child molestation before a jury in the Superior Court of California. He was charged with one count of molesting a boy named Andrew and six counts of molesting a boy named Michael. Henry was found guilty of the count involving Andrew, a mistrial was declared as to five of the counts and Henry was acquitted of one count. He was sentenced to six years in prison.

The incident involving Andrew allegedly occurred when Andrew was attending St. Paul's Church and Day School and Henry was the rector of the church and dean of the school. Andrew could not remember if he was in kindergarten or first grade at the time of the incident. He was ten years old and in fourth grade at the time of his testimony.

On the day in question, Andrew was apparently outside Henry's office waiting for his parents, who were late, to pick him up. Andrew testified that Henry called Andrew into his office alone and closed the door behind them. Henry allegedly told Andrew to lie on the couch and pull down his pants. Andrew stated that Henry then touched him on the penis for about three minutes.

Andrew was then told to leave the office and wait for his parents.

Henry contends that molestation could not have occurred during this incident. Henry knew that Andrew's parents were late and could arrive at any moment. Furthermore, the area outside the office was normally bustling with adults and children. There was a window in Henry's office that looked out onto walkways used by the children, and observers apparently could see through the drapes on this window.

At trial, Tomoko and Tobias Yeh, members of St. Paul's Episcopal Church and parents of children who attended the school, testified for the prosecution. In April 1987, Ms. Yeh was told by the wife of the police chief that Henry was believed to have molested Andrew. The Yehs confronted Henry, who allegedly stated that something had happened but that it had been misinterpreted, and denied molesting Andrew.

After the prosecution rested and the defense presented its evidence, the prosecution moved to reopen their case in chief to present the testimony of Thomas Hackett. Hackett was prepared to testify that almost twenty years earlier Hackett's eleven-year-old son told him that Henry had touched him. When Hackett confronted Henry with the allegation, Henry allegedly responded that he had been counseling Hackett's son for an emotional problem which caused him to grab himself when nervous, and that the son was mistaken about the touching.

The trial judge found that the exchange between Hackett and Henry resembled the meeting between the

Yehs and Henry because it was a similar confrontation, with a similar denial and explanation. The judge ruled that when the defendant used the same excuse to explain his conduct on more than one occasion, his prior statements were admissible to prove the falsity of the explanation. Henry objected that the evidence had no probative value because there was no evidence to show that the prior explanation to Hackett had, in fact, been false. Henry also objected to the prejudice caused by the introduction of the testimony. The trial judge overruled these objections.

Hackett then testified that in 1969 his eleven-year-old son attended a church school, where Henry was rector of the church. His son informed him that he was touched by Henry, and Hackett confronted Henry with the information. Henry responded that he had been counseling the son on a problem the son had regarding his grabbing himself when he was nervous. Henry did not indicate where the son was grabbing himself, but Hackett felt Henry's intimation was that the son was grabbing his penis. Hackett testified he then told Henry that, according to his son's story, it sounded more like molestation. Henry responded that his son was "mistaken or misunderstood, words to that effect."

The trial judge attempted to minimize the danger of the testimony by giving a cautionary jury instruction, part of which read:

> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation, if you

> find that it was made, of his conduct, is not genuine.
>
> When a defendant uses a similar explanation of his conduct on more than one occasion, his prior statements may, if found to have been made, show that his present explanation, if found to have been made, is not genuine.

Henry appealed his conviction to the California Court of Appeal. He argued that the introduction of the testimony was contrary to California law and that its introduction resulted in a "miscarriage of justice" under the California Constitution, article VI, section 13. The Court of Appeal unanimously ruled that the admission of the testimony was error because Hackett's testimony was not probative of any material issue unless the jury improperly assumed the earlier accusation was false, and that the instruction, instead of alleviating the risk of error, virtually required the forbidden inference that Henry was a person of bad character or a person with a disposition to commit bad acts. However, the majority ruled that the error was not prejudicial because it was "not reasonably probable a different result would have been reached in the absence of the admission of this evidence."

After rehearing was denied and his petition for review to the California Supreme Court was rejected, Henry filed a habeas corpus petition in the United States District Court for the Central District of California. The district court granted the petition, adopting the United States Magistrate's finding that Henry had exhausted his state remedies and that the error violated Henry's due process right to receive a fundamentally fair trial.

Standard of Review

We review de novo the district court's decision on a habeas corpus petition. *Thomas v. Brewer*, 923 F.2d 1361, 1364 (9th Cir. 1991).

Discussion

1. *Exhaustion of state remedies.*

A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir.1991). Principles of comity and deference underlie the exhaustion requirement, which assures that the state courts will have the first " 'opportunity to pass upon and correct' alleged violations of" state prisoners' federal rights. *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S.Ct. 407, 408-09, 30 L.Ed.2d 418 (1971) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 848-49, 9 L.Ed.2d 837 (1963)).

To satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 277-78, 92 S.Ct. 509, 513-14, 30 L.Ed.2d 438 (1971). The purpose of this "fair presentation" requirement is to "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (quoting *Picard*, 404 U.S. at 276-77, 92 S.Ct. at 513). We have held that a federal claim "is fairly presented if the petitioner has described the operative facts and legal theory upon

which his claim is based." *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir.1986).

There is no doubt that Henry presented the "operative facts" to the California court. The question is whether he presented the "legal theory." Henry's federal habeas claim is that the erroneous admission of evidence at his state criminal trial, followed by the jury instruction, violated his federal constitutional right to due process and was so prejudicial as to require reversal of the conviction. In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a "miscarriage of justice" under the California Constitution. Cal. Const. art. VI, § 13. However, to state a federal due process claim it is not necessary to invoke "the talismanic phrase 'due process of law' " or cite "book and verse on the federal constitution;" petitioner need only make "essentially the same arguments" before the state and federal courts to exhaust a claim. *Tamapua*, 796 F.2d at 262-63. Thus, under *Picard* and *Anderson*, exhaustion requires only that petitioner present "the substance of the federal claim" in state court. *Id.* at 262. We find that Henry has done so, regarding both his argument that the erroneous admission of the testimony and the instructional error were a violation of his federal due process right and his argument that the error was so prejudicial as to warrant reversal.

As to the first point, it is well established that denial of due process in a state criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice. [The court] must find that the absence

of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). Henry's federal due process claim is that the admission of Hackett's testimony, along with the instructions concerning it, deprived him of a fair trial. He argues that Hackett's testimony was not probative of any material issue in his case unless the jury assumed a fact about which it had heard no testimony: that Hackett's son's accusation was true. He further argues that the jury instructions encouraged the jury to make this impermissible, highly prejudicial assumption. His claim is thus that "there are *no* permissible inferences the jury may draw" from Hackett's testimony, and that it is "of such [inflammatory] quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir.1991); *see also Estelle v. McGuire*, 502 U.S. 62, ___, 112 S.Ct. 475, 481, 116 L.Ed.2d 385 (1991) (inflammatory evidence that is irrelevant may work a due process violation).

Henry made "essentially the same arguments," *Tamapua*, 796 F.2d at 262, in his opening brief to the California Court of Appeal. He claimed that Hackett's testimony was "not relevant – it had no tendency to prove or disprove any disputed fact that was of consequence to the determination of the action." He added that the jury instruction "compounded the error" because, in encouraging the jury to see Hackett's testimony as relevant, it "as much as said that defendant had molested [Hackett's son] 20 years before." The Court of Appeal agreed, and wrote in its disposition that Hackett's testimony, while

"inherently inflammatory," had "no probative value at all."

We reach the same conclusion as to the essential identity of Henry's state and federal arguments regarding the prejudicial effect of the error. Under California law, a miscarriage of justice is reversible only when "it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error." *Watson*, 299 P.2d at 254. The federal standard, recently set forth by the Supreme Court in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), is phrased somewhat differently, but is essentially the same test; the Supreme Court held that in reviewing a collateral challenge based on a "trial-type" constitutional error, a federal court will not reverse the conviction unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at ___, 113 S.Ct. at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).

The errors that occurred at Henry's trial – the introduction of Hackett's testimony and the subsequent jury instruction – were clearly errors of the "trial type" because they "occurred during the presentation of the case to the jury". *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). Therefore, under the new *Brecht* harmless error standard, we must inquire whether the testimony had a "substantial and injurious effect or influence" on the verdict.[1] This standard is similar to the *Watson* standard used by California

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[1] *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), does not bar the retroactive application of the *Brecht*

courts; under both tests, reversal is required if the error had a significant inculpatory impact. When the California Court of Appeal determined that it was not "reasonably probable" that Henry would have been acquitted had the Hackett testimony not been introduced (the *Watson* standard), it effectively determined that the testimony had not had a "substantial and injurious effect or influence" on the outcome (the *Brecht* standard).

Henry has thus made "essentially the same arguments" before the state and federal courts regarding both the existence of federal constitutional error and the prejudicial impact thereof. We hold that he has exhausted his state post-conviction remedies.

2. *Due process violation.*

We next consider whether in light of the record as a whole, the admission of the Hackett testimony and the subsequent jury instruction violated Henry's federal due process right; if so, we must then determine whether the error was sufficiently prejudicial as to warrant reversal. We answer both questions in the affirmative.

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standard to Henry's case. *Teague* held that a new constitutional rule of criminal procedure may generally not be applied retroactively to a case on collateral review. *Id.* at 307, 109 S.Ct. at 1073-74. However, *Teague* also held that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300, 109 S.Ct. at 1070 (quotation omitted). Because the Supreme Court applied the *Brecht* standard to Brecht himself, *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1722, "evenhanded justice" thus requires that we apply it to Henry as well.

The admission of inculpatory testimony violates due process only "if there are *no* permissible inferences the jury may draw from the evidence" and the testimony is "of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (quotation omitted). *See also McGuire*, 502 U.S. at ___, 112 S.Ct. at 481-82, 116 L.Ed.2d 385 (1991). Hackett's testimony was not probative of any material issue in the case.[2] As the California Court of Appeal stated in its opinion, "[t]he only way [Henry's] denial or the accompanying exculpatory explanatory statement would be probative at all is if it showed consciousness of guilt. To do this, [his] earlier statement would have to be shown to be false. . . . " The court noted that the jury heard no evidence regarding the truth or falsity of Hackett's son's accusation, and therefore had no basis on which to judge the truth or falsity of Henry's denial of that accusation. The court therefore concluded, "without evidence from which the jury could determine [Henry's] statement to Hackett was false *it had no probative value at all* (emphasis added)." We agree. There were

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[2] This fact distinguishes Hackett's testimony from the prior injury evidence at issue in *McGuire*. There, the defendant had been tried for the killing of his infant daughter, and the prosecution had introduced evidence indicating that the baby had earlier suffered rectal tearing and fractured ribs. *McGuire*, 502 U.S. at ___, 112 S.Ct. at 478. *McGuire* was convicted and subsequently sought habeas relief on the ground that this prior injury evidence was irrelevant and highly prejudicial. *Id.* at ___, 112 S.Ct. at 479. The Supreme Court held that the evidence was relevant because it tended to show that the baby's death was not accidental and thus was probative of intent. *Id.* at ___, 112 S.Ct. at 480-81. Here, however, Hackett's testimony did not tend to make any of the elements of the charged offense more likely.

no permissible inferences the jury could have drawn from Hackett's testimony, and it was so inflammatory as to necessarily have deprived Henry of a fair trial. Its admission therefore violated Henry's due process rights.

Furthermore, the testimony and subsequent jury instruction were highly prejudicial. The prosecution's case against Henry was not particularly strong. The main prosecution witness was Andrew himself, who was only six or seven years old when the alleged molestation occurred. The defense offered evidence that cast doubt on Andrew's testimony, such as the fact that people could see through the windows of Henry's office and the fact that Andrew's parents were late and could have arrived at any point during the occurrence of the alleged molestation.

The prosecution bolstered Andrew's testimony with that of the Yehs, who testified they had heard rumors that Henry had molested Andrew; when they confronted Henry with that allegation, Henry responded that something had happened but that it had been misinterpreted. Hackett's testimony implied that Henry lied to Hackett and thus also to the Yehs, despite the fact that no evidence was presented to show that Henry's explanation to Hackett was false. As the magistrate pointed out, Hackett's testimony was particularly prejudicial given the "emotionally charged atmosphere present in any child abuse prosecution."

The prejudicial nature of the testimony was magnified by its timing. The prosecution was allowed to re-open its case-in-chief to present Hackett as the last witness, and he testified on the day of closing arguments. The

prosecutor emphasized the testimony at length in his closing argument. The trial court's jury instructions only compounded the prejudicial effect. The California Court of Appeal found that it was error to admit the testimony of Hackett and, although it found the error not to be prejudicial,[3] noted:

> The instruction given to the jury, while advising them the former accusation and denial cannot be used to show appellant has bad character or a disposition to commit such acts but only to determine whether his out-of-court explanation of his conduct is genuine, of necessity required the jury to focus on the prior accusation to determine whether his present denial was not true. The only way such a determination could be made is to assume the earlier accusation was true. The instruction virtually requires the inference the first part of the instruction appears to forbid.

The instruction was given not once but twice: once directly before Hackett's testimony and again during the general jury instructions.

We hold that the testimony and jury instruction were highly prejudicial, and they rendered Henry's trial fundamentally unfair and denied him due process. We find that

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[3] We reject the Court of Appeal's conclusion that the inflammatory impact of Hackett's testimony was diminished in this case because "evidence was properly received on six similar charged offenses involving a different victim [Michael]" and if jurors were to be prejudiced against appellant it was from that more specific testimony that bias may have arisen. Henry was not convicted on any of these charges and was *only* convicted of the charges involving Andrew.

Henry has shown that the testimony and jury instruction had a "substantial and injurious effect or influence" on the jury's verdict, and the district court's order granting the petition is affirmed.

AFFIRMED.

BRUNETTI, Circuit Judge, dissenting.

The majority relies on this court's decision in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir.1986), to find that Henry satisfied the exhaustion requirement. While it is not for this panel to call *Tamapua* itself into question, I believe that the majority's interpretation of *Tamapua* as controlling the outcome here brings *Tamapua* into conflict with the Supreme Court's decision in *Anderson v. Harless*, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982).

My review of the state court record compels me to conclude that, contrary to the requirement of *Anderson*, Henry did not provide the California courts with a fair opportunity to apply the legal principles controlling his federal due process claim. As a result, Henry failed to exhaust his state court remedies and the majority errs in reaching the merits of his petition.

I

Our review of Henry's state court proceedings must be governed by the Supreme Court decision in *Anderson*. *Anderson* refined the standard declared in *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), that "the substance of a federal habeas corpus claim must first be presented to the state courts," *id.* at 278, 92 S.Ct. at 513, and set forth this guiding principle: "28 U.S.C. § 2254

requires a federal habeas petitioner to provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. . . . [T]he habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim." 459 U.S. at 6, 103 S.Ct. at 277 (citations and internal quotations omitted).

In *Anderson*, the Court reversed the Sixth Circuit's affirmance of a federal district court's conditional grant of Harless's application for a writ. The challenge to Harless's state trial involved a jury instruction on whether malice should be implied from the defendant's use of a weapon. In Michigan state court, Harless had presented the operative facts upon which his federal claim would be based, argued that the instruction was reversible error, and cited a Michigan decision grounded in state law only. Harless's federal Sandstrom claim[1] addressed the same instruction and also argued that its use represented error. The Supreme Court held that Harless had not exhausted this claim in state court, in that exhaustion required more than presentation to the state courts of all facts necessary to support the federal claim, and *more than* that a "*somewhat similar* state-law claim was made." *Id.* (emphasis added). *Anderson* thus demands a close examination of the record.

The majority opinion here turns instead on *Tamapua*'s gloss on *Anderson*, which seems to allow a finding of exhaustion if Henry's state court claim of miscarriage of

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[1] *See Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

justice was "essentially the same argument," *Tamapua*, 796 F.2d at 262, as a claim of denial of federal due process. Unfortunately, reliance on this *Tamapua* phrase is improvident and misleading, for it directs us away from the real basis of *Anderson*.

In *Tamapua*, this court said that a claim is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based, even if he subsequently reformulates his claims somewhat. The decision equated "operative facts and legal theory" to the "substance" of the claim. 796 F.2d at 262 (emphasis added).

Tamapua had persistently argued in state court that the indictment and evidence were insufficient, and that the act for which he had been convicted was not a crime. We stated that Tamapua's argument before this court was "essentially the same," although it now carried a federal due process label. The court concluded that Tamapua's state court claims had satisfied the fair presentation requirement because Tamapua's primary contention in state court proceedings was that he had been convicted with insufficient evidence, and that sufficiency of the evidence used to convict is a fundamental concern of the due process clause. 796 F.2d at 262-63 (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970)). Moreover, the *Tamapua* court observed that:

> In Tamapua's reply brief to the state supreme court, he correctly cited *State v. Lima*, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982), for the proposition that "it is well established as a precept of *constitutional* as well as statutory law that an accused in a criminal case can only be convicted

> upon proof by the prosecution of every element of the crime charged beyond a reasonable doubt."

Id. at 263. Declaring that exhaustion did not mean that Tamapua must have "invoke[d] the talismanic phrase 'due process of law' in the state proceedings to gain access to the federal courts," the court decided that "the Hawaii Supreme Court had a full and fair opportunity to address the substance of Tamapua's claims." *Id.*

The crux of *Tamapua* was this judgment that the Hawaii Supreme Court had had a full and fair opportunity to address the substance of Tamapua's federal claim. Contrary to the assertion of the majority here, *Tamapua* did *not* set up a new exhaustion test based upon whether "essentially the same" arguments were made in state and federal courts. I can discern no such standard from *Anderson* and *Picard*, and I believe the majority now erroneously creates such a test by employing the *Tamapua* language in contravention of Anderson's teaching. *Tamapua* is necessarily only an application of *Anderson* and *Picard*, not a novel legal precedent.

I thus disagree with the majority's use of *Tamapua* here. *Anderson* requires that the specific federal constitutional argument must be presented to or considered by the state court. *Anderson*, 459 U.S. at 7, 103 S.Ct. at 277. The Supreme Court there rejected the Sixth Circuit's conclusions that "the due process ramifications" of Harless's argument to the Michigan court were "self-evident" and that reliance on a state-court case was sufficient to present the state court with the substance of his due process challenge to the malice instruction. Henry's state challenge had the same defect.

The majority's reading of *Tamapua* is unnecessary; it is also wrong because it permits outcomes that contradict the specific requirements and holding of *Anderson*.

II

As *Anderson* requires, let us compare the claim Henry actually made in state court to the substance of his federal claim in habeas, and then consider whether the state courts had a fair opportunity to apply the controlling federal legal principles to the facts bearing on Henry's constitutional claim. *Anderson*, 459 U.S. at 6-7, 103 S.Ct. at 277-78; *Tamapua*, 796 F.2d at 263. In both cases, Henry argued that admission of the Hackett testimony was reversible error, but the similarity largely ends there.

The state law claim was that: (1) admission of the testimony was error under the California Evidence Code; and (2) the error required reversal because it had resulted in a "miscarriage of justice" under Article VI, § 4½ (now § 13) of the California Constitution. Given the elaboration of this standard in *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243 (1956), *cert. denied*, 355 U.S. 846, 78 S.Ct. 70, 2 L.Ed.2d 55 (1957), a California reviewing court could not reverse Henry's conviction on the basis of this claim unless Henry could demonstrate that it was *reasonably probable* that a result more favorable to him would have been reached absent admission of the Hackett testimony.[2]

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[2] Parenthetically, there is nothing in *Watson* to suggest that its mention of "the constitutional requirements of a fair trial and due process" was anything other than a reference to the *state* constitution's guarantees. *Watson*, 46 Cal.2d at 835, 299 P.2d

In his federal habeas petition, Henry contended that he had been denied due process at trial because evidence of an uncharged crime was erroneously admitted (the Hackett testimony) and was then coupled with a jury instruction emphasizing that same evidence. Had Henry presented this federal claim to the state courts, he would have argued that the error had "so fatally infected the proceedings as to render them fundamentally unfair," *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir.1991), such that it acquired federal due process dimensions and should be analyzed under the prejudice standard of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Chapman* would then have mandated reversal unless the *state* showed that the constitutional error was "harmless beyond a reasonable doubt." *Id.* at 24, 87 S.Ct. at 828. Henry did not present, nor did the California courts of their own volition consider, such a federal claim.

The California courts would thus have applied a markedly different prejudice standard to Henry's claim had they considered it as a federal due process challenge. Instead of the state-law *Watson* reasoning the California courts actually used, they would have applied the federal *Chapman* standard (not *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), as the majority asserts[3]), and the state and not Henry would have carried

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243. *See Cal. Const.* Art. I, § 15 (fair trial and due process guarantees in criminal cases). The California Supreme Court in Watson cited only its own precedents in support of this reference. 46 Cal.2d at 835-36, 299 P.2d 243.

[3] The majority attempts, without visible support, to skate over this defect in its analysis. It is irrelevant that *if* Henry had

the burden regarding a prejudice showing. The *Chapman* analysis would have been more favorable to Henry, thus giving the state a greater opportunity to correct its own mistake.

Under *Anderson*, the exhaustion requirement mandates that the substance of a federal claim be asserted with particularity in the state court. *Anderson*, 459 U.S. at 7, 103 S.Ct. at 277-78. Henry's citing of a state court decision predicated on state law (e.g., *Watson*) does not apprise the state reviewing court of a potential federal claim. *Id.* at 7 n. 3, 103 S.Ct. at 277-78 n. 3. While this case is at least as close as *Anderson*, under these principles the difference between the *Watson* and *Chapman* standards dictates the conclusion that Henry failed to exhaust his federal claim in state court, even if one accepts the majority's equation of "miscarriage of justice" with "fundamental[ ] unfair[ness]." To the extent the majority employs the *Tamapua* standard of "essentially the same argument" to find exhaustion, it distorts the required analysis into a semantic exercise, allowing federal courts to construe and consider federal claims that were never fairly presented to or considered by – and thus never exhausted in – the state courts. *Picard*, 404 U.S. at 276, 92 S.Ct. at 512-13. *Anderson*, 459 U.S. at 7, 103 S.Ct. at 278.

A review of the record confirms that the California courts were not apprised of Henry's federal claim.

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exhausted his federal claim in state court a federal habeas court might have employed the Brecht standard in evaluating the collateral attack.

III

I have examined the entire state-court record available to us in this case. Henry's written materials cited only provisions of the California Constitution, California statutes, and California state case law. At trial, his counsel did not mention other sources of authority.

Henry never suggested that the trial court's admission of the testimony at issue violated due process or any other federal right. Henry's only invocations of due process and "constitutional" rights (which may or may not have signaled a federal, as opposed to state, constitutional claim) occurred in relation to a different alleged defect of the trial having to do with the specificity of the charge upon which Henry was convicted, a matter which he has not pursued on appeal.

A. *The State Trial Court.* The trial court based its decision to admit the testimony upon California state-law cases interpreting the California Evidence Code that held admissible, in a trial on a given charge, evidence of the defendant's similar prior explanations regarding similar previous allegations against him. The trial court additionally considered Cal.Evid.Code § 352 (inadmissibility because of prejudicial effect requires excess of prejudice over probative value) and found the testimony admissible. The limiting instruction came from the same cases as well as California model instructions.

Henry's counterarguments focused on rebutting the state's use of the California state-law cases and asserted that other California state-law cases precluded the evidence. He reargued the same ground during the court's consideration of his motion for a new trial.

Thus, at no time during proceedings in the state trial court did Henry argue that admission of the Hackett testimony was anything more than an error under the California Evidence Code and California cases interpreting state law.

B. *Appellate Proceedings.* Henry's Opening Brief for the California Court of Appeal made "essentially similar" arguments with respect to this aspect of the trial. He argued that the testimony was inadmissible as both hearsay and propensity act evidence. Henry continued to challenge the authority of the state-law cases upon which the trial court had relied, and contended that the prejudicial effect of the testimony had outweighed the probative value. Further, Henry claimed that the state had improperly withheld the evidence until the end of the case, citing various state-law cases holding that such conduct could render the evidence inadmissible.

Henry's brief concluded that the alleged error had been highly prejudicial and that (as Art. VI, § 13 of the California Constitution required him to plead) the error had resulted in a "miscarriage of justice." He cited *People v. Watson* for the test regarding prejudicial effect. Henry's Reply Brief covered no new ground.

Although we have no transcript of the argument in the Court of Appeal, that court's decision demonstrates that the court was unaware of any claims based upon federal law. The court found that the trial court had erred in admitting the testimony, but did not find prejudice to Henry: "we cannot say the result would probably have been different had the evidence not been adduced at the end of trial." This standard comes from California's own

Watson test which, as we know, differs from the federal *Chapman* standard the court would properly have applied to an error of federal law. One judge dissented on the basis that the majority's *Watson* assessment was simply wrong, but suggested no new sources of law. The opinion does demonstrate that the California courts actually decided a claim of miscarriage of justice.

C. *Petition for Review in the California Supreme Court.* Henry's Petition for Review in the California Supreme Court returned to the miscarriage of justice argument with respect to the challenged testimony. Henry contended that admission of the Hackett testimony was "reversible error under Article VI, Section [13] of the Constitution and Evidence Code § 353(b)." He contested the Court of Appeal's *Watson* analysis of prejudice, and asked the state Supreme Court to clarify the *Watson* standard, but Henry did not suggest that use of *Watson* was in any sense a federal constitutional error.

I have also reviewed each of the California decisions Henry cited, and none of them refers to federal constitutional provisions, federal statutes, or federal decisions in any manner which should have apprised the state courts of Henry's federal claim.

Conclusion

In sum, Henry never indicated to the California courts any federal basis for his claim of error with respect to the testimony at issue, and he certainly did not argue for application of standards that were more than "somewhat similar" to the controlling federal legal principles. Each and every one of his arguments depended upon

California sources of law and challenged the method of application, but never the underlying exclusive applicability, of those sources.

I conclude that Henry did not exhaust his state remedies and that this court should not have considered Henry's federal due process claim on the merits.

APPENDIX C

OCTOBER TERM, 1994

Per Curiam

DUNCAN, WARDEN *v.* HENRY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-941. Decided January 23, 1995

Respondent, a rector and dean of a church day school, was convicted in a California court of sexually molesting a student. At trial, he objected to testimony by the parent of another child who claimed to have been molested 20 years earlier. On direct appeal, he argued that this error was a "miscarriage of justice" under the State Constitution, but the state appellate court found the error harmless. Respondent then filed a federal habeas petition, alleging that the evidentiary error violated federal due process, an argument that he had not made in the state proceedings. The District Court found that he had exhausted his state remedies and granted the petition. The Court of Appeals affirmed.

Held: Respondent did not exhaust his state remedies. If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must be alerted to the fact that the prisoners are asserting claims under the United States Constitution. See *Picard v. Connor*, 404 U.S. 270; *Anderson v. Harless*, 459 U.S. 4. Since respondent did not raise his federal due process argument in the state court, that court

> understandably confined its analysis to the application of state law.

Certiorari granted; 33 F. 3d 1037, reversed.

PER CURIAM.

Respondent, a rector and dean of a church day school, was tried and convicted in state court of sexually molesting a 5-year-old student. At trial, respondent objected to testimony by the parent of another child who claimed to have been molested 20 years previously. His objection was based on Cal. Evid. Code Ann. § 352 (West 1966). On direct appeal, he pursued his evidentiary objection and requested the appellate court to find that the error was a "miscarriage of justice" under the California Constitution. California applies this provision in determining whether or not an error was harmless. *People v. Watson*, 46 Cal. 2d 818, 299 P. 2d 243 (1956). The California Court of Appeal found the error harmless and affirmed respondent's conviction. *People v. Henry*, No. CR23041 (2d Dist. 1990), App. D to Pet. for Cert. 6.

Respondent then filed a petition for writ of habeas corpus in federal court, alleging that the evidentiary error amounted to a denial of due process under the United States Constitution. The District Court granted the petition and the Court of Appeals for the Ninth Circuit affirmed. *Henry v. Estelle*, 33 F. 3d 1037 (1994). The court held that respondent had exhausted his state remedies even though he had not claimed a violation of any federal constitutional right in the state proceedings:

> "In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony

> was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a 'miscarriage of justice' under the California Constitution. However, to state a federal due process claim it is not necessary to invoke 'the talismanic phrase "due process of law' " or cite 'book and verse on the federal constitution'. . . . " *Id.*, at 1040 (citations omitted).

In *Picard v. Connor*, 404 U. S. 270, 275 (1971), we said that exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to the state courts in order to give the State the " 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court. Accord, *Anderson v. Harless*, 459 U. S. 4 (1982).

Picard and *Harless* control the outcome in this case. Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not openly a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment. The failure is especially pronounced in that respondent did specifically raise a due process objection before the state court based on a different claim – that the pleading was uncertain as to when the offense occurred.

App. D to Pet. for Cert. 8. The California Court of Appeal analyzed the evidentiary error by asking whether its prejudicial effect outweighed its probative value, not whether it was so inflammatory as to prevent a fair trial. 33 F. 3d, at 1046. As recognized by dissenting Judge Brunetti, those standards are no more than " 'somewhat similar,' " *id.*, at 1047, not "virtually identical" as claimed by JUSTICE STEVENS, *post*, at 369. Both *Picard* and *Harless* emphasized that mere similarity of claims is insufficient to exhaust. *Picard, supra*, at 276; *Harless, supra*, at 6. The state court, when presented with respondent's claim of error under the California Evidentiary Code, understandably confined its analysis to the application of state law.

Accordingly, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

I concur in the judgment because respondent's "miscarriage of justice" claim in state court was reasonably understood to raise a state-law issue of prejudice, not a federal issue of due process. Consequently, no federal claim was "fairly presented to the state courts" within the meaning of *Picard v. Connor*, 404 U. S. 270, 275 (1971).

JUSTICE STEVENS, dissenting.

Today's opinion sets forth a new rule of law that is a substantial departure from our precedents. In my opinion, it is unwise for the Court to announce a new rule without first hearing argument on the issue. The Court's opinion is especially distressing because it creates an

exacting pleading requirement that serves no legitimate purpose in our habeas corpus jurisprudence.

In *Picard v. Connor*, 404 U. S. 270 (1971), after full briefing and argument, the Court issued an opinion carefully explaining the rule that a state prisoner must exhaust his state-court remedies before applying for a federal writ of habeas corpus. We held that the exhaustion requirement is satisfied when "the federal claim has been fairly presented to the state courts." *Id.*, at 275. We made it clear, however, that the prisoner need not place the correct label on his claim, or even cite the Federal Constitution, as long as the substance of the federal claim has been fairly presented.

As we explained: "Obviously there are instances in which 'the ultimate question for disposition,' *United States ex rel. Kemp v. Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion." *Id.* at 277. Thus, until today, prisoners have not been required to exhaust their federal claims "by citing 'book and verse on the federal constitution.' " *Id.*, at 278 (citation omitted). Rather, the rule has been simply that they must present "the substance of a federal habeas corpus claim . . . to the state courts." *Ibid.*

Today the Court tightens the pleading screws by adding the requirement that the state courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Ante*, at 365-366. As support for that proposition the Court cites

Picard and *Anderson v. Harless*, 459 U. S. 4 (1982), but neither case is in point. In the former, the Court pointed out that the claim asserted in state court – that an indictment was invalid under Massachusetts law – was different from the equal protection claim first raised in federal court; in the latter, the Court carefully explained why it concluded that the state-law basis for objecting to a jury instruction differed from the federal rule announced in *Sandstrom v. Montana*, 442 U. S. 510 (1979). While I disagreed with the view that Harless' federal claim had not been fairly presented to the state courts, see 459 U. S., at 9-12 (dissenting opinion), I surely did not understand the Court's opinion to hold that the exhaustion doctrine includes an exact labeling requirement.

Nor have the Court's of Appeals demonstrated any such understanding of *Harless* or *Picard*. To the contrary, the Circuits have analyzed the exhaustion question without rigidly insisting that a prisoner invoke the "talismanic" language of federal law. See *Tamapua v. Shimoda*, 796 F. 2d 261, 263 (CA9 1986); see also, *e.g.*, *Hawkins v. West*, 706 F. 2d 437, 439-440 (CA2 1983); *Lesko v. Owens*, 881 F. 2d 44, 50 (CA3 1989), cert. denied, 493 U. S. 1036 (1990); *West v. Wright*, 931 F. 2d 262, 266 (CA4 1991), rev'd on other grounds, 505 U. S. 277 (1992); *Satter v. Leapley*, 977 F. 2d 1259, 1262 (CA8 1992); *Bowser v. Boggs*, 20 F. 3d 1060, 1063 (CA10), cert. denied, *post*, p. 926; *Nichols v. Sullivan*, 867 F. 2d 1250, 1252-1253 (CA10), cert. denied, 490 U. S. 1112 (1989); *Hutchins v. Wainwright*, 715 F. 2d 512, 518-519 (CA11 1983), cert. denied, 465 U. S. 1071 (1984).

The new rule the Court announces today is hypertechnical and unwise. It will prolong litigation without

serving any valid purpose. the example of a challenge to a coerced confession cited in *Picard*, 404 U. S., at 277, illustrates the point. If a prisoner presents all his evidence to a state court, and if the standard for judging the voluntariness of a confession under state law is the same as under federal law, the state court has had a fair opportunity to pass on the claim regardless of whether the prisoner relies on both the State and Federal Constitutions or just the former. If the state courts have considered and rejected such a claim on state-law grounds, nothing is to be gained by requiring the prisoner to present the same claim under a different label to the same courts that have already found it insufficient. The cost of needless litigation is, however, significant both the judicial system, see *Harless*, 459 U. S., at 8 (STEVENS, J., dissenting), and to persons like respondent who are imprisoned despite their meritorious federal claims.

In the case before us today, the Court of Appeals for the Ninth Circuit carefully analyzed the exhaustion issue. On the merits, respondent presented the Court of Appeals with a federal due process claim, the crux of which was that the testimony of Thomas Hackett, a witness for the prosecution, was so inflammatory and irrelevant as to render his trial fundamentally unfair. Cf. *Estelle v. McGuire*, 502 U. S. 62, 75 (1991) (severely prejudicial evidentiary errors may violate due process). Respondent had challenged the admission of Hackett's testimony on direct appeal in state court. 33 F.3d 1037, 1040 (CA9 1994). To be sure, he had cited only state law. *Ibid.* As carefully explained by the Court of Appeals, however, the standards for addressing respondent's state-law claims were virtually identical to those applied in federal court on

habeas review. *Id*, at 1041-1042. Thus, after full discussion of the issue, the Ninth Circuit concluded that respondent had exhausted his claims.[1]

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[1] The contrast between the Ninth Circuit's thoughtful opinion and this Court's cursory disposition of an important issue is best illustrated by quoting the lower court's reasoning in full:

"To satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts. *Picard v. Connor*, 404 U. S. 270, 277-78 . . . (1971). The purpose of this 'fair presentation' requirement is to 'provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim.' *Anderson v. Harless*, 459 U. S. 4, 6 . . . (1982) (quoting *Picard*, 404 U. S. at 276-77 . . .). We have held that a federal claim 'is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based.' *Tamapua v. Shimoda*, 796 F. 2d 261, 262 (9th Cir. 1986).

"There is no doubt that Henry presented the 'operative facts' to the California court. The question is whether he presented the 'legal theory.' Henry's federal habeas claim is that the erroneous admission of evidence at his state criminal trial, followed by the jury instruction, violated his federal constitutional right to due process and was so prejudicial as to require reversal of the conviction. In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a 'miscarriage of justice' under the California Constitution. Cal. Const. art. VI, § 13. However, to state a federal due process claim it is not necessary to invoke 'the talismanic phrase "due process of law" ' or cite 'book and verse on the federal constitution'; petitioner need only make 'essentially the same arguments' before the state and federal courts to exhaust a claim. *Tamapua*, 796 F. 2d at 262-63. Thus, under *Picard* and *Anderson*, exhaustion requires only that petitioner present 'the substance of the federal claim' in state

Judge Brunetti dissented from the majority's analysis, but on a ground that is entirely different from that

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court. *Id.* at 262. We find that Henry has done so, regarding both his argument that the erroneous admission of the testimony and the instructional error were a violation of his federal due process right and his argument that the error was so prejudicial as to warrant reversal.

"As to the first point, it is well established that denial of due process in a state criminal trial 'is the failure to observe that fundamental fairness essential to the very concept of justice. [The court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.' *Lisenba v. California*, 314 U. S. 219, 236 . . . (1941). Henry's federal due process claim is that the admission of Hackett's testimony, along with the instructions concerning it, deprived him of a fair trial. He argues that Hackett's testimony was not probative of any material issue in his case unless the jury assumed a fact about which it had heard no testimony: that Hackett's son's accusation was true. He further argues that the jury instructions encouraged the jury to make this impermissible, highly prejudicial assumption. His claim is thus that 'there are *no* permissible inferences the jury may draw' from Hackett's testimony, and that it is 'of such [inflammatory] quality as necessarily prevents a fair trial.' *Jammal v. Van de Kamp*, 926 F. 2d 918, 920 (9th Cir. 1991); *see also Estelle v. McGuire*, 502 U. S. 62, [70] . . . (1991) (inflammatory evidence that is irrelevant may work a due process violation).

"Henry made 'essentially the same arguments,' *Tamapua*, 796 F. 2d at 262, in his opening brief to the California Court of Appeal. He claimed that Hackett's testimony was 'not relevant – it had no tendency to prove or disprove any disputed fact that was of consequence to the determination of the action.' He added that the jury instruction 'compounded the error' because, in encouraging the jury to see Hackett's testimony as relevant, it 'as much as said that defendant had molested [Hackett's son] 20 years before.' The Court of Appeal agreed, and wrote in its disposition that Hackett's testimony, while 'inherently inflammatory,' had 'no probative value at all.'

advanced by this Court in what appears to be its

"We reach the same conclusion as to the essential identity of Henry's state and federal arguments regarding the prejudicial effect of the error. Under California law, a miscarriage of justice is reversible only when 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.' *Watson*, 299 P. 2d at 254. The federal standard, recently set forth by the Supreme Court in *Brecht v. Abrahamson*, [507 U. S. 619] (1993), is phrased somewhat differently, but is essentially the same test; the Supreme Court held that in reviewing a collateral challenge based on a 'trial-type' constitutional error, a federal court will not reverse the conviction unless the error ' "had substantial and injurious effect or influence in determining the jury's verdict." ' *Id.*, at 623 . . . (quoting *Kotteakos v. United States*, 328 U. S. 750, 776 . . . (1946)).

"The errors that occurred at Henry's trial – the introduction of Hackett's testimony and the subsequent jury instruction – were clearly errors of the 'trial type' because they 'occurred during the presentation of the case to the jury.' *Arizona v. Fulminante*, 449 U. S. 279, 307 . . . (1991). Therefore, under the new *Brecht* harmless error standard, we must inquire whether the testimony had a 'substantial and injurious effect or influence' on the verdict. This standard is similar to the *Watson* standard used by California courts; under both tests, reversal is required if the error had a significant inculpatory impact. When the California Court of Appeal determined that it was not 'reasonably probable' that Henry would have been acquitted had the Hackett testimony not been introduced (the *Watson* standard), it effectively determined that the testimony had not had a 'substantial and injurious effect or influence' on the outcome (the *Brecht* standard).

"Henry has thus made 'essentially the same arguments' before the state and federal courts regarding both the existence of federal constitutional error and the prejudicial impact thereof. We hold that he has exhausted his state post-conviction remedies." 33 F. 3d, at 1040-1042 (footnote omitted).

holding.[2] He did not merely argue that there was no exhaustion because the prisoner had failed to cite the Federal Constitution. Rather, he carefully explained his view that the federal claim differed from the state claim because it was governed by the harmless-error standard in *Chapman v. California*, 386 U. S. 18 (1967), rather than a California standard similar to *Brecht v. Abrahamson*, 507 U. S. 619 (1993). I am inclined to believe that the majority had the better of the argument because the *Brecht* standard would apply in the federal habeas proceeding. But the important point of the dissent is that, like the majority, it correctly perceived the exhaustion question as whether the claim had been fairly presented to the state courts, not whether respondent had attached the correct label.

This Court should not abruptly terminate thoughtful debate among conscientious Circuit judges by summarily announcing a new rule. If we are to depart from the standard set forth in *Picard* and *Harless*, we should do so only after thorough consideration with the benefit of full briefing and argument. I respectfully dissent.

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[2] At the end of its opinion, the Court seems to back away from any ironclad labeling requirement by endorsing Judge Brunetti's view that respondent's federal claim was different in important respects from the argument that was presented in state court. If the Court seeks to reverse the Ninth Circuit on these grounds, without overruling the rule of *Harless* and *Picard*, much of the language in the Court's opinion is nothing more than unnecessary dicta. The confusion on this critical point is itself a reason to avoid summary disposition of this case.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT HENRY, Petitioner, v. WAYNE ESTELLE, WARDEN, et al., Respondents.	)	No. CV 90-4064-RMT(E) JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that this Petition is denied and dismissed without prejudice.

DATED: 9/26, 1995.

s/ Robert M. Takasugi
ROBERT M. TAKASUGI
UNITED STATES
DISTRICT JUDGE

SERVED ON US BY MAIL
POSTMARKED 10/23/95

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT HENRY, Petitioner, v. WAYNE ESTELLE, WARDEN, et al., Respondents.	)	No. CV 90-4064-RMT(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition without prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner, counsel for Petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 9/26, 1995.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT HENRY, Petitioner, v. WAYNE ESTELLE, WARDEN, et al., Respondents.	No. CV 90-4064-RMT(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Upon the recommendation of Magistrate Judge John Kronenberg, this Court previously granted the petition for writ of habeas corpus. The United States Court of Appeals for the Ninth Circuit affirmed. *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994). The United States Supreme Court reversed, finding Petitioner had not exhausted state remedies. *Duncan v. Henry*, 115 S. Ct. 887 (1995). The Ninth Circuit then vacated its prior opinion, reversed the judgment and remanded the matter. *Henry v. Estelle*, 52 F. 3d 809, 810 (9th Cir. 1995). On August 25, 1995, this case was reassigned to Magistrate Judge Charles F. Eick.

In accordance with the directives of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit, the Petition should be denied and dismissed without prejudice for failure to exhaust state

remedies. *Id.; see Brown v. Mass*, 11 F.3d 914 (9th Cir. 1993) (exhaustion or non-exhaustion of state remedies must be assessed as of the time the habeas action is filed). THEREFORE, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation: and (2) directing that Judgment be entered denying and dismissing the Petition without prejudice.

DATED: August 30, 1995

/s/ Charles F. Eick
CHARLES F. EICK
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rule of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT E. HENRY, Petitioner, vs. DANIEL LUNGREN, ATTORNEY, GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No: CV 96-8509-RMT (RNB) **JUDGMENT**

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is conditionally granted as follows: Unless petitioner is brought to retrial within sixty (60) days of the date this Judgment becomes final (plus any additional delay authorized under State law), or if petitioner is brought to retrial as aforesaid and such trial results in anything other than a final judgment of conviction, the underlying judgment in Ventura County Case No. CR-23041 shall be vacated; and respondent shall discharge petitioner from all adverse consequences of his conviction, and shall delete from the California Department of Justice data base maintained pursuant to Cal.

Penal Code § 290.4 all information referring to or based upon the vacated judgment.

DATED: 7/16/97

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
UNITED STATES
DISTRICT JUDGE

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. HENRY, Petitioner-Appellee, V. DANIEL LUNGREN, California State Respondent-Appellant, WAYNE ESTELLE, Respondent.	No. 97-56215 D.C. No. 96-CV-8509 ORDER (Filed April 1, 1999)

Before: B. FLETCHER, THOMPSON, AND McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.